

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 EHR 18085

**PETITIONER'S
PREHEARING STATEMENT**

1. Nature of the Proceeding; the Issues to be Resolved

The nature of this proceeding and the issues to be resolved are described in the petition for contested case hearing filed by APGI on September 25, 2013 (“Petition”), including Attachment B to the Petition (“Attachment B”) and the other attachments (“Attachments”) that were incorporated into the Petition. APGI’s statements in the Petition and its Attachments are incorporated herein by reference, including the defined terms contained in the Petition and its Attachments, unless a term is specifically defined otherwise in this Statement. All of the declarations in this Statement are supplementary to the statements in the Petition and Attachment B, and all such statements are subject to further supplementation and modification based on pleadings, discovery and other developments in the case.

As noted in the Petition, this case challenges the denial of APGI's application dated September 28, 2012 ("Application") submitted to Respondent Division of Water Quality ("DWQ") (now Division of Water Resources, or "DWR") of the Department of Environment and Natural Resources for a Water Quality Certification ("401 Certification") for the four hydroelectric dams and associated reservoirs that APGI owns and operates on the Yadkin River ("Yadkin Project"). APGI submitted the Application pursuant to § 401 of the Clean Water Act ("CWA") and the rules adopted by the Environmental Management Commission ("EMC") implementing that CWA provision and codified at 15A NCAC 2H .0500 ("NC 401 Rules"). Respondent's denial of the Application was by letter from Thomas A. Reeder to E. Ray Barham, dated August 2, 2013 ("Denial"), a copy of which is attached to the Petition as Attachment A.

In general, the issues to be resolved arise because DWR, in issuing the Denial, acted arbitrarily and capriciously, failed to act as required by law and rule, exceeded its authority or jurisdiction, failed to use proper procedure, and/or acted erroneously, all in violation of N.C. Gen. Stat. § 150B-23(a), and because DWR's actions in issuing the Denial involved both errors of law or actions that were not adequately supported by substantial evidence. Among other things, the Denial failed to follow or implement – and was directly contrary to – the recommendations contained in Attachment C to the Petition entitled "Hearing Officer's Report and Recommendations," dated July 29, 2013, issued by Jim Gregson to Mr. Reeder, which included the recommendation that DWR issue to APGI a 401 Certification substantially in the form of the draft included as Attachment D to the Petition. APGI asserts, without limitation, the following erroneous actions by DWR in issuing the Denial:

- (1) interpreting and/or applying the NC 401 Rules in a manner that was different from past interpretation and application of those rules in similar situations;

- (2) changing its interpretation and/or application of the NC 401 Rules without articulating a reasonable explanation for deviating from past practices;
- (3) changing its interpretation and/or application of the NC 401 Rules without providing APGI notice and opportunity to present conforming evidence;
- (4) failing to interpret and apply the NC 401 Rules in accordance with their plain meaning;
- (5) failing to interpret and apply the NC 401 Rules in a manner that is consistent with the CWA and NC statutes, including failing to interpret and apply them to protect water quality;
- (6) exceeding its authority and jurisdiction by interpreting and applying the NC 401 Rules in a manner inconsistent with the CWA, including failing to interpret and limit its application of such rules to the protection of water quality;
- (7) interpreting and applying the NC 401 Rules in a manner that is inconsistent with the manner in which DWR has acted as to other applications for 401 water quality certifications;
- (8) interpreting and applying the NC 401 Rules in a manner that is inconsistent with the manner in which DWR has acted as to other applications for 401 water quality certifications for other similar hydroelectric projects located in North Carolina regulated by the Federal Energy Regulatory Commission;
- (9) ignoring or failing to take into account the long-standing presence and successful operation of the hydroelectric dams and related facilities, which has demonstrated APGI's possession of sufficient interests to be able to assure compliance with applicable water quality standards;

- (10) acting in a manner contrary to positions previously taken by the State of North Carolina regarding ownership of the hydroelectric dams and related facilities;
- (11) acting on the Denial in a manner that was not substantially based on – or otherwise related to – the protection of water quality, and, in fact, had resulted in further delays in the improvement of the quality of the water in the Yadkin River and the Project’s impoundments and discharges through the implementation of projects that are contemplated under the Draft 401;
- (12) acting contrary to the express terms of § .0502(f) and other provisions of the NC 401 Rules;
- (13) failing to accept the recommendation of the Hearing Officer to issue a 401 Certification to APGI;
- (14) acting inconsistently with the statements, conclusions, recitations and/or recommendation in the Hearing Officer’s Report and Recommendation;
- (15) not using proper procedure by failing to consider whether APGI was a public entity and has the power of eminent domain, in accordance with 15A NCAC 2H.0502(f) of the NC 401 Rules;
- (16) not using proper procedure by failing to consider whether APGI was or had been authorized by the owner to apply for certification, in accordance with 15A NCAC 2H.0502(f) of the NC 401 Rules; and
- (17) not using proper procedure by failing to undertake rulemaking to modify the meaning and interpretation that DWR gave to 15A NCAC 2H.0502(f) of the NC 401 Rules.

As described in paragraph 2 below, Petitioner anticipates that there may be other legal issues raised by the facts and reasons supporting appeal. Petitioner reserves the right to amend or supplement this list of issues to be resolved, including any changes on account of information derived through discovery or other means.

2. Brief Statement of the facts and reasons supporting the Issue(s) in dispute.

DWR issued the Denial only hours after the State of North Carolina filed suit against APGI in Wake County Superior County, and these circumstances are described in Attachment B to the Petition, which is incorporated by reference herein. On Monday, July 29, 2013, the DWR employee assigned to oversee the Public Hearing, Jim Gregson (“Hearing Officer”), issued his “Hearing Officer’s Report and Recommendations,” which is attached as Attachment C to the Petition. Among other things, the Hearing Officer made an unequivocal recommendation that the 401 Certification be issued to APGI, stating that, “[b]ased on the comments received at the public hearing, the comments received during the three comment periods, the review of the record for the project, the site visit, and discussions with other DWQ [now DWR] staff, I recommend that the 401 Certification be issued.” In fact, DWR had prepared and transmitted to its Director a draft 401 water quality certification for issuance to APGI, a copy of which attached as Attachment D to the Petition. The Draft 401 Certification, including its conditions, is entirely consistent with the Hearing Officer’s recommendations in the Report. Notwithstanding the Hearing Officer’s recommendation and DWR’s preparation of the Draft 401 Certification approving the Application, DWR reversed course and on August 2, 2013 (four days later) issued the Denial instead.

Neither DWR nor its predecessor, the Division of Water Quality, had ever requested information about or raised any question or challenge to the sufficiency of ownership interests held by APGI in the Project lands. DWQ had issued two prior 401 water quality certifications

for the Project to APCI in 2008 and 2009 without the issue of ownership of the submerged lands or dams ever being raised in the review of the applications for those certifications or in the 401 certifications themselves.

Finally, in connection with APCI's earlier applications for 401 certification, as well its 2012 Application (which ultimately resulted in the Denial), DWQ/DWR made numerous Additional Information Requests ("AIRs"), each time indicating that it would deem the application in question "incomplete" and on hold until the requested information was supplied. APCI responded completely to each of those AIRs, and DWQ/DWR never indicated that any of the AIR responses or the relevant application was incomplete or on hold because of any question related to APCI's ownership of the dams. Further, as indicated in the Hearing Officer's Report and Recommendations, "APCI reiterated its claim of ownership in a letter, dated July 3, 2013, stating that 'APCI owns the facilities from which the discharges originate, which are the Yadkin Project's four hydroelectric dams.'" No showing to the contrary was made by any participant in the Application process.

3. The statutes, rules, and legal precedent, if known

While Petitioner is uncertain as to what statutes or rules DWR will state as a basis for its action, Petitioner currently believes that the following may be at issue in this matter:

N.C. Gen. Stat. § 143B-282(a)(1)u.
N.C. Gen. Stat. § 150B-23
N.C. Gen. Stat. § 150B-3(b)
15A N.C.A.C. 2H Section .0501-.0507
33 U.S.C. § 1341

Petitioner reserves the right to supplement this list of authorities as other authorities are discovered during legal research and preparation for the contested case hearing.

4. List of proposed witnesses.

The following are witnesses who APCI currently contemplates it might call:

Ray Barham, APGI
Thomas A. Reeder, Director, Division of Water Resources
Karen Higgins, Division of Water Resources
Lori Montgomery, Division of Water Resources
Jim Gregson, Division of Water Resources

The witnesses would be called to testify as to the bases and facts that are involved in the issuance of the Denial. Petitioner reserves the right not to call any of the above and also to identify additional witnesses as discovery proceeds.

5. Whether Petitioner wishes to pursue Discovery, and, if so, the estimated length of time required.

Petitioner anticipates filing one or more dispositive motions, including a motion based on the legal issues detailed in Section 1, above, without the need for any discovery and/or a motion for summary adjudication following limited discovery sufficient to support such a motion, as well as a motion that would be based on some discovery. Such discovery would likely include primarily interrogatories, requests for admissions, and production and/or authentication of documents. As this case proceeds, it is possible that APGI would conduct one or more depositions.

Petitioner contemplates engaging in mediation with DWR as by the Court's order and anticipates that it may need to extend the discovery beyond that contemplated in the Court's Scheduling Order. APGI expects that it will take at least 45 days for it to complete discovery following the end of the mediation process.

6. Proposed Date and Location of the Hearing stated in the Scheduling Order.

Petitioner concurs that venue is appropriate in Raleigh, N.C. However, given the likely schedule for mediation and dispositive pretrial motions, APGI believes that any evidentiary hearing should be set no earlier than April 1, 2014. APGI believes that any hearing on its initial

dispositive motion mentioned in Section 5, above, could be scheduled during the week of January 27, 2014.

7. **Contact Information.**

Not applicable – Petitioner is represented by counsel.

8. **Estimated length of hearing.**

Petitioner estimates the hearing will take 2-3 days.

9. **Other special considerations.**

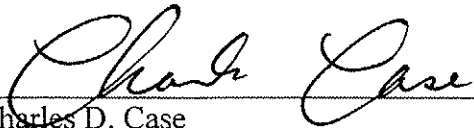
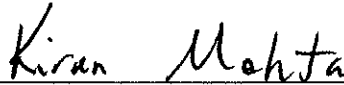
On the basis of the 2008 Application, DENR issued a second 401 certification to APGI on May 7, 2009 (“2009 401”). On May 8, 2009, Stanly County filed a petition for a contested case hearing at OAH challenging the 2009 401, which was docketed as 09 EHR 3078 (“County Appeal”). On May 13, 2009, the Yadkin Riverkeeper filed a petition for a contested case hearing at OAH also challenging the 2009 401, which was docketed as 09 EHR 3179 (“Riverkeeper Appeal”). On July 7, 2009, APGI filed a petition for contested case hearing at OAH challenging the terms of the 2009 401, which was docketed as 09 EHR 4092 (“APGI Appeal”). The County, Riverkeeper and APGI Appeals were consolidated for hearing (“Consolidated Appeals”) before Administrative Law Judge (“ALJ”) Joe L. Webster and hearings were conducted, but no final order was issued as to the Consolidated Appeals.

On December 1, 2010, the 2009 401 was revoked by DENR (“Revocation”), and on January 28, 2011, APGI filed in the OAH a petition for contested case hearing challenging the Revocation, which case was docketed as 11 EHR 0934 (“Revocation Appeal”) and assigned to ALJ Webster. As a result of the Revocation, the Consolidated Appeals were stayed by orders entered by ALJ Webster, the last one of which (entered June 17, 2012) states that “further proceedings are stayed until the revocation appeal is resolved.” Then, on September 27, 2012, ALJ Webster granted the motion filed by APGI and dismissed the Revocation Appeal without

prejudice (“Dismissal Order”). As indicated in the Dismissal Order, APGI was afforded the opportunity to “re-file its Petition based on the same claim” within one year of the date of the Order, that is, or on or before September 27, 2013. However, APGI elected not to re-file the Revocation Appeal by that date, and all issues concerning the Consolidated Appeals as well as the Revocation Appeal have been mooted by the Application and DWR’s processing thereof. Accordingly, APGI anticipates filing later this week a motion to dismiss the Consolidated Appeals on the grounds of mootness.

The Consolidated Appeals have been dormant for an extended period of time, and the present appeal is the only active matter concerning a 401 certification for the Yadkin Project now before OAH. In light of ALJ Webster’s appointment as the Magistrate Judge for the United States District Court for the Middle District of North Carolina, APGI believes that it would be appropriate to transfer the Consolidated Appeals to Judge Gray so that APGI’s Motion to Dismiss those appeals can be handled by the ALJ handling the current appeal.

This the 4th day of November, 2013.

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing **PETITIONER'S PREHEARING STATEMENT** to be served on the following individuals electronically as a courtesy and by depositing a copy of the same in the United States mail, first class, postage prepaid and addressed as follows:

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This the 4th day of November, 2013